APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 233—October Term, 1959.

(Argued March 11, 1960 Decided April 4, 1960.)

Docket No. 25928

THADDEUS G. BENTON and J. LAMAR BUTLER,
Plaintiffs-Appellants,

—v.—

GLENN McCARTHY, GLENN McCARTHY, INC., and
WILLIAM McCARTHY, *Defendants-Appellees*.

Before: CLARK, WATERMAN and LEWIS,* *Circuit Judges*.

Appeal from the United States District Court for the Southern District of New York, Frederick vanPelt Bryan, *Judge*.

Plaintiffs appeal from a judgment for defendants denying their claims for agents' or brokers' commission.

THADDEUS G. BENTON, New York City (Neilson Olcott, Lawrence W. Krieger, and Leslie W. Gallt, New York City, on the brief), *appellant pro se and for appellant J. Lamar Butler*.

LEO B. MITTELMAN, New York City, for defendants-*appellees*.

PER CURIAM:

Defendant Glenn McCarthy, the owner of an oil and gas concession in Bolivia, desired to obtain financing for the development of the concession through the sale of an un-

* Of the Tenth Circuit, sitting by designation.

divided interest in the lease. Such an agreement was entered into by defendant corporation and Keljikan Commercial Corporation, which purchaser was obtained through plaintiffs' efforts. The defendants, however, were unable to procure guarantees from the Mutual Securities Agency against expropriation of the lease or as to conversion of the profits from Bolivian to American currency, as was contemplated by the agreement. Hence the agreement was terminated without any payments being made by Keljikan.

Plaintiffs allege an oral commission contract under which they were to receive a 10 per cent "carried" interest in the enterprise, plus 5 per cent of the purchase price. Defendants' position is that the commission promised was a reasonable percentage of the financing obtained, payable if and when such moneys were actually received. The district court, concluding that the "plaintiffs' version of the transactions is not credible in the light of all the evidence and all of the facts and circumstances," found for the defendants.

On this appeal, plaintiffs recite at some length the evidence adduced at the trial in an attempt to overturn the findings below. They have, however, succeeded only in demonstrating the conflicting nature of the testimony. Hence Judge Bryan's findings of fact cannot be found "clearly erroneous," F. R. 52(a); and we can find no reason to disturb his resolution of the conflict in favor of the defendants. The terms of the express contract found by the judge, conditioned upon the actual receipt of the financing payments by the defendant corporation, exclude any possibility of recovery in *quantum meruit*.

Judgment affirmed.

Before CLARK, WATERMAN, and LEWIS, Circuit Judges.

On Petition for Rehearing.

Thaddeus G. Benton, Arlington, Va. (Neilson Olcott, Lawrence W. Krieger, and Leslie W. Gallt, New York City, of counsel), appellant pro se and for appellant J. Lamar Butler.

PER CURIAM.

Petition for rehearing denied.

C.E.C.
S.R.W.
D.T.L.
U.S.C. JJ.

Apr. 29, 1960

Plaintiffs' Trial Exhibit 6

GLENN McCARTHY, INC.
2121 WEST HOLCOMBE BLVD.
HOUSTON 25, TEXAS

June 20, 1955

Mr. J. Lamar Butler,
% Plaza Hotel,
New York City, N.Y.

Re: Glenn McCarthy, Inc.

Dear Lamar:

This is to advise you that your proposal with respect to payment for your services in connection with the private financing of the subject Company has been presented to me for my consideration, and that the same is totally unacceptable. This is also to advise you that I do not know Messrs. Thaddeus Benton and Ralph A. Hopkins, and that I have never discussed the Company or this matter with either of such persons, and that I do not consider myself

obligated to make payment of any amount to either of such persons.

You have always been advised by me that exorbitant finder's fees would not be tolerated by the purchaser and I am advised the trade would not be consummated if such were the case, as contemplated by you.

I will pay you the usual and customary finder's fee. I have investigated the matter through brokerage concerns located in this City and I have been advised that such fee in this matter would be from 2% to 2½% of the funds ultimately received by the Company as a result of the efforts of the finders. Therefore, I am willing to pay you the maximum fee of 2½% of the funds received from Keljikan Commercial Corporation, or its nominees, when, as and if such funds are received. Under the terms of the agreement I am presently discussing with Keljikan Commercial Corporation you would receive $50,000 in the aggregate, payable as follows: $6,250 on the day that the first payment is made by Keljikan Commercial Corporation and the balance at the rate of $2,500 per month as monthly payments are made by Keljikan Commercial Corporation.

Yours very truly,

GLENN H. McCARTHY

Glenn H. McCarthy

Plaintiffs' Trial Exhibit 16

April 23, 1956

Glenn McCarthy, Inc.
2131 West Holcombe Boulevard
Houston 25, Texas

Re: Bolivian Concession

Dear Sirs,

The contracts between us dated June 20, 1955 and June 30, 1955, have resolved themselves into the circumstances

that because of the long delays in obtaining the necessary MSA guarantees and assurances in accordance with the contracts we have been unable to go forward with the contemplated investment on our part and as a result, although we have gone to very considerable expense and effort in the matter over the past period of nearly a year, we are not, because of the absence of such guarantees and assurances, prepared immediately to proceed with the financing.

Appreciating the fact that you have exerted every possible effort to obtain the necessary guarantees and assurances, we can not continue to hold the matter open. In lieu of any and all claims which we might assert, but without your admitting or conceding any liability we have agreed between us that you will assign to us without further consideration a one-sixteenth carried working interest in the Bolivian concession, which is the subject of said contract, within thirty days from the date hereof in manner and form satisfactory to our counsel so as to convey to us the said one-sixteenth carried working interest. Upon the completion of such assignment, said contracts of June 20, 1955 and June 30, 1955, shall thereupon be deemed terminated, without further obligation on the part of either of us to each other.

Please be assured that we regret the circumstances which have brought about this termination unsatisfactory to both of us and assure you of our continued friendship.

Upon signature by you at the foot of a duplicate of this letter this will constitute an agreement between us.

Very truly yours,

KELLIKAN COMMERCIAL CORPORATION

By ROBERT B. KELLIKAN

GLENN McCARTHY, INC.

By GLENN H. McCARTHY
President

Defendants' Trial Exhibit E

April 23, 1956.

Glenn McCarthy, Inc.,
Houston, Texas.

Gentlemen,

Further with reference to our termination agreement signed this day it is understood and agreed between us that we will not assert any claim against Glenn McCarthy, Inc. for any services rendered by us in the negotiating of the Anaconda gas fuel contract, if such should be made.

We have been most happy to have been of service to you in connection therewith, and we sincerely hope that you will be able to consummate your arrangements and arrange for the necessary financing.

Very truly yours,

KELJIKAN COMMERCIAL CORP.
By

Judgment and Commitment

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. Cr 157-56

UNITED STATES OF AMERICA

v.

WILLIAM J. McCARTHY

On this 17th day of June, 1960 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of guilty of the offense of using interstate

telephonic communication in a scheme to defraud. T. 18 Sec 1343 & 2. Using the mails in a scheme to defraud. T. 18 Sec 1341 & 2. Using the mails for sale and delivery of securities not registered with S.E.C. T. 15 USC Sec 77e (a) (1) & 77x and 77e (a)(2). Conspiracy to violate Sec 77e(a)(1), 77e (a)(2) T. 15 USC—(Sec. 371 T 18 USC) as charged in 37 counts and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Three and one half years and fined $10,000.00 on count 50; Three and one half years on each of counts 1, 2 and 34 to run concurrently with each other and to the sentence imposed on count 50; Three and one half years on each of counts 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 30, 31, 32, 38, 39, 40, 43, 46, 47 and 48 to run concurrently with each other but consecutively to the prison sentence imposed on counts 1, 2, 34, 50.

The execution of the sentence imposed on each of counts 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 30, 31, 32, 38, 39, 40, 43, 46, 47 and 48 is suspended. Defendant placed on probation for Three and one half years to begin at the end of the prison sentence imposed on cts. 1-2-34 & 50. Condition of probation that defendant shall not engage directly or indirectly in the sale or marketing of securities or hold any position of a fiduciary nature. Probation subject to the standing probation order of this court. Defendant to stand committed until fine is paid or otherwise discharged according to law. Remanded.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Mar-

shal or other qualified officer and that the copy serve as the commitment of the defendant.

LLOYD F. MACMAHAN
United States District Judge.

The Court recommends commitment to:[6]

HERBERT A. CHARLSON
Clerk.

A TRUE COPY
HERBERT A. CHARLSON
Clerk, U. S. District Court for
Southern District of N. Y.

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[1] Insert "by counsel" or without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the asssitance of counsel." [2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3] Insert "in count(s) number " if required. [4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [6] For use of Court wishing to recommend a particular institution.

Judgment and Commitment

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. Cr 157-56

UNITED STATES OF AMERICA

v.

LEO B. MITTELMAN

On this 17th day of June, 1960 came the attorney for the government and the defendant appeared in person and[1] by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of[2] not guilty and a verdict of guilty by a jury of the offense of using the mails in a scheme to defraud T 18 Sec 1341 & 2 USC; Conspiracy to violate Sec. 77e(a)(1) 77e (a) (2) & 77x T. 15 USC as charged[3] 2 and 50 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] Count two—Five Years, Count 50—Five Years and fined $10,000.00 Prison sentence on count 50 to run consecutively to the prison sentence imposed on count 2.

Execution of prison sentence imposed on count 50 is suspended and defendant placed on probation for five years to begin at the end of the prison sentence imposed on count two, subject to the standing probation order of this court. Further condition of probation that defendant

shall not engage directly or indirectly in the sale or marketing of securities or hold any position of fiduciary nature. Defendant to stand committed until fine is paid or otherwise discharged according to law. Bail fixed in the sum of $5,000.00 pending appeal, to be furnished by 5 PM.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Lloyd F. MacMahan
United States District Judge.

The Court recommends commitment to:[6]

Herbert A. Charlson
Clerk.

A True Copy
Herbert A. Charlson
Clerk, U. S. District Court for
Southern District of N. Y.

Seal

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[1] Insert "by counsel" or without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the asssitance of counsel." [2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3] Insert "in count(s) number " if required. [4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [6] For use of Court wishing to recommend a particular institution.

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